

FILED  
Clerk  
District Court

JUN 19 2018

for the Northern Mariana Islands  
By af  
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS

STAR MARIANAS AIR, INC.,

Plaintiff,

vs.

COMMONWEALTH PORTS AUTHORITY,  
and DOES I-IV,

Defendants.

Case No.: 17-cv-00012

**DECISION AND ORDER GRANTING  
DEFENDANT'S MOTION TO DISMISS  
AND PLAINTIFF'S REQUEST FOR  
LEAVE TO AMEND**

Plaintiff Star Marianas Air, Inc. brings this lawsuit against Defendants Commonwealth Ports Authority ("CPA") and Does I-IV for alleged violations of the Anti-Head Tax Act and breach of contract. (First Am. Compl. ("FAC"), ECF No. 2.) Defendant CPA seeks to dismiss for lack of subject matter jurisdiction. (Mot. to Dismiss, ECF Nos. 10-11.) Plaintiff opposes the motion, and also seeks leave to amend should the Court grant the motion to dismiss. (Resp. Br. 8, ECF No. 14.)

For the reasons discussed below, Defendant's motion to dismiss is GRANTED, and Plaintiff's request for leave to amend the breach of contract claim is also GRANTED.

**I. BACKGROUND**

Plaintiff is an airline that, in 2009, entered into an agreement with Defendant CPA, which controls and operates the airports in the Commonwealth, to lease and use areas of the commuter terminals on Saipan, Tinian, and Rota. (*See* Agreement, Ex. C, ECF Nos. 4-3 and 4-4.)

Under the Agreement, Star Marianas Air agreed to adhere to the CPA Airport Rules and Regulations (*see* Agreement sec 7.14, ECF No. 4-4 at 3), and to pay a departure facility charge,

1 international arrival facility charge, and in-transit passenger service charge. (*Id.* sec. 7.01, ECF No.  
2 4-4 at 29.) The charges “are or may be computed on a per-passenger basis.” (*Id.*) In exchange for  
3 payment of these charges, CPA must adjust the amount of the fees to ensure that they are “reasonable  
4 and non-discriminatory rates.” (*Id.* sec. 7.05, ECF No. 4-3 at 32.) Further, CPA must mail Star  
5 Marianas Air a copy of the proposed airport budgets and consider any comments received regarding  
6 the fee rates. (*Id.* sec. 7.08, ECF No. 4-3 at 33–34.) Plaintiff must also have “reasonable access” to  
7 Defendant’s records, and has a “right to audit the financial data used” to determine the fee rates. (*Id.*  
8 sec. 7.10, ECF No. 4-4 at 1.) Finally, if CPA determines that Plaintiff has paid in excess of what is  
9 required, Plaintiff is entitled to a refund. (*Id.*)

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11 Plaintiff is now suing Defendants, arguing that the charges calculated on a per-passenger basis  
12 violate the Anti-Head Tax Act (“AHTA”). Under the AHTA, a state actor “may not levy or collect a  
13 tax, fee, head charge, or other charge” on individuals traveling in air commerce. 49 U.S.C. §  
14 40116(b)(1). Plaintiff claims that the per-passenger user fees charged in the Agreement are on their  
15 face a head tax. (FAC ¶¶ 87–95.) Plaintiff also claims that Defendants breached the Agreement by  
16 (1) failing to provide it with a copy of its proposed annual budget; (2) failing to adjust annual fees as  
17 appropriate to recover only operational costs; (3) failing to provide operating cost financial  
18 information and charging a head tax instead of rates related to operational costs; and (4) charging  
19 Plaintiff fees that exceed the amount permitted under the terms of the contract. (*Id.* ¶¶ 51–52, 58–61,  
20 77–85.)

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22 CPA now seeks to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P.  
23 12(b)(1). (Mot., ECF No. 10.) Specifically, CPA asserts that the AHTA does not provide a private  
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1 right of action and Plaintiff has failed to exhaust its administrative remedies, and without a federal  
2 claim, the Court lacks supplemental jurisdiction over the breach of contract claim. (*Id.* at 5.)

## 3 **II. LEGAL STANDARD**

4 “The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a  
5 party, or by a court on its own initiative, at any stage in the litigation.” *Arbaugh v. Y&H Corp.*, 546  
6 U.S. 500, 506 (2006). Rule 12(b)(1) challenges may be facial or factual. “In a facial attack, the  
7 challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke  
8 federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations  
9 that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*,  
10 373 F.3d 1035, 1039 (9th Cir. 2004).

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12 In a facial attack, a court must assume the allegations in the complaint to be true and “draw all  
13 reasonable inferences in [plaintiff’s] favor.” *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)  
14 (internal citations omitted). By contrast, in a factual attack, the court “may review evidence beyond  
15 the complaint without converting the motion to dismiss into a motion for summary judgment,” and  
16 “need not presume the truthfulness of the plaintiff’s allegations.” *Safe Air for Everyone*, 373 F.3d at  
17 1039. Once the moving party submits affidavits or other evidence, the opposing party “must furnish  
18 affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.”  
19 *Id.* (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)).

## 20 **III. DISCUSSION**

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22 Defendant CPA contends that the Court lacks subject matter jurisdiction because the AHTA  
23 does not provide a private right of action. (Mot. 5.) Thus, according to CPA, Plaintiff must exhaust  
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1 administrative remedies before filing suit, and because it has not done so, the Court has no  
2 supplemental jurisdiction over the remaining breach of contract claim. (Mot. 5.) Plaintiff responds  
3 that there is a private right of action and there is no requirement to exhaust administrative remedies.  
4 (*See generally* Resp. Br., ECF No. 14.) Plaintiff further requests leave to amend the complaint if the  
5 Court grants the motion to dismiss the AHTA claim. (*Id.* at 8.)

6 **A. Whether the AHTA Contains A Private Right of Action**

7 CPA contends that there is no private right of action under the AHTA. (Mot. 5–8.) Plaintiff  
8 responds that the apparent circuit split demonstrates that the Court may find that there is a private right  
9 of action. (Resp. Br. 3–5.)

10 To determine whether a federal statute confers an implied right of action, a court must apply  
11 the four-factor test from *Cort v. Ash*. *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1231  
12 (9th Cir. 2008). The four factors are (1) whether the plaintiff is “one of the class for whose especial  
13 benefit the statute was enacted”; (2) whether there is evidence of legislative intent to create or deny a  
14 remedy; (3) whether the cause of action is “consistent with the underlying purposes of the legislative  
15 scheme”; and (4) whether the cause of action is “traditionally relegated to state law.” *Id.* (quoting  
16 *Cort*, 422 U.S. 66, 78 (1975)). The “key inquiry in this calculus” is the second factor. *Id.* (internal  
17 quotation omitted). “And as with any case involving the interpretation of a statute,” the analysis “must  
18 begin with the language of the statute itself.” *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568  
19 (1979); *Greene v. Sprint Commc’n Co.*, 340 F.3d 1047, 1050 (9th Cir. 2003). The legal context  
20 “matters only to the extent it clarifies text.” *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001).  
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1 The relevant statutory text of the Anti-Head Tax Act is as follows:

2 (b) Prohibitions.--Except as provided in subsection (c) of this section  
3 and section 40117 of this title, a State, a political subdivision of a State,  
4 and any person that has purchased or leased an airport under section  
5 47134 of this title may not levy or collect a tax, fee, head charge, or  
6 other charge on--

- 7 (1) an individual traveling in air commerce;  
8 (2) the transportation of an individual traveling in air commerce;  
9 (3) the sale of air transportation; or  
10 (4) the gross receipts from that air commerce or transportation.

11 (c) Aircraft taking off or landing in State.--A State or political  
12 subdivision of a State may levy or collect a tax on or related to a flight  
13 of a commercial aircraft or an activity or service on the aircraft only if  
14 the aircraft takes off or lands in the State or political subdivision as part  
15 of the flight.

16 (e) Other allowable taxes and charges.--Except as provided in  
17 subsection (d) of this section, a State or political subdivision of a State  
18 may levy or collect--

- 19 (1) taxes (except those taxes enumerated in subsection (b) of this  
20 section), including property taxes, net income taxes, franchise taxes,  
21 and sales or use taxes on the sale of goods or services; and  
22 (2) reasonable rental charges, landing fees, and other service  
23 charges from aircraft operators for using airport facilities of an  
24 airport owned or operated by that State or subdivision.

49 U.S.C. § 40116.

25 The Ninth Circuit has long held that the Federal Aviation Act, which includes the AHTA, was  
26 “intended to benefit equally both airline passengers and employees.” *In re Mexico City Aircrash of*  
27 *Oct. 31, 1979*, 708 F.2d 400, 406 (9th Cir. 1979). Thus, the first *Cort* factor is satisfied. However,  
28 absent congressional intent to create a private right of action, this factor is not determinative. *Id.*

1 As for the second and “key” factor—congressional intent—there is no dispute that the statute  
2 lacks an express right of action. However, the U.S. Courts of Appeal are split as to whether this factor  
3 weighs in favor of or against finding an implied right of action. Specifically, the Seventh and Tenth  
4 Circuits have found that there is no implied right of action under the AHTA, and the First and Sixth  
5 Circuits have found that there is. The Ninth Circuit has not addressed the issue.

6 The cases decided by the First and Sixth Circuits held that, because the text of the AHTA did  
7 not refer to the Secretary of Transportation and therefore did not refer to the regulatory enforcement  
8 scheme overseen by the Secretary, the AHTA was not subject to the administrative enforcement  
9 provisions of the FAA, which suggested Congress intended to create a private right of action. *Nw.*  
10 *Airlines, Inc. v. Cnty. of Kent, Mich.*, 955 F.2d 1054, 1058 (6th Cir. 1992), *rev’d on other grounds by*  
11 *510 U.S. 355* (1994); *Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 16 (1st Cir. 1987).  
12 Additionally, the courts relied on legislative history indicating that Congress viewed airlines as a “kind  
13 of surrogate” for passengers, and concluded that airlines, on behalf of passengers, would have an  
14 incentive to file challenges to any tax imposed, again indicating that Congress intended for private  
15 enforcement of the statute. *Nw. Airlines, Inc.*, 955 F.2d at 1058; *Interface Grp., Inc.*, 816 F.2d at 16.

17 By contrast, the Seventh and Tenth Circuits relied on a Supreme Court decision post-dating  
18 the decisions of the First and Sixth Circuit to conclude that there was no private right of action under  
19 the AHTA. Specifically, the Supreme Court stated that the “Secretary of Transportation is charged  
20 with administering the federal aviation laws, including the AHTA.” *Nw. Airlines, Inc. v. Cnty. of Kent*,  
21 *510 U.S. 355, 366–67* (1994). Given this description, the Seventh and Tenth Circuits concluded that  
22 the AHTA was subject to the administrative enforcement scheme overseen by the Secretary of  
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1 Transportation. *Miller Aviation v. Milwaukee Cnty. Bd. of Supervisors*, 273 F.3d 722, 730–31 (7th  
2 Cir. 2001); *Sw. Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162 (10th Cir. 2001). In addition,  
3 the Seventh Circuit considered subsection (e) of the AHTA, which permits “reasonable” fees and  
4 charges to be levied but does not define “reasonable.” *Miller Aviation*, 272 F.3d at 730–31. According  
5 to the Seventh Circuit, this subsection indicated that the Secretary of Transportation was better  
6 positioned to determine whether charges were reasonable and further suggested that Congress intended  
7 for the AHTA to be governed by the administrative enforcement scheme. *Id.*

8         The Court finds the reasoning of the Seventh and Tenth Circuits persuasive. First, these cases  
9 take into account more fully the statutory relationship between the AHTA and entire FAA. The AHTA  
10 is listed under subpart I of Part A of the FAA. 49 U.S.C. § 46101(a)(1), which is listed under subpart  
11 IV of Part A, states that “A person may file a complaint in writing with the Secretary of Transportation  
12 . . . about a person violating this *part*.” The text therefore indicates that a complaint with the Secretary  
13 may be lodged for violating any provision within Part A, including the AHTA provisions. Further,  
14 given the FAA’s “emphasis on administrative regulation and enforcement” it seems “highly  
15 improbable that Congress absentmindedly forgot to mention an intended private action.” *In re Mexico*  
16 *City Aircrash of Oct. 31, 1979*, 708 F.2d at 407 (quoting *Transam. Mortg. Advisors*, 444 U.S. 11, 20  
17 (1979)).

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19         Finally, the interpretive approach taken by the Seventh and Tenth Circuits is consistent with  
20 the Supreme Court’s more restrictive method for finding implied causes of action that was adopted  
21 following the decisions from the First and Sixth Circuits. See *Ziglar v. Abbasi*, \_\_\_ U.S. \_\_\_, 137 S.  
22 Ct. 1843, 1855 (2017) (noting that the Court has “adopted a far more cautious course before finding  
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1 implied causes of action” because “where Congress intends private litigants to have a cause of action,  
2 the far better course is for Congress to confer that remedy in explicit terms.”). The Ninth Circuit has  
3 also recognized that, since 2001, the Supreme Court has “narrowed the framework for evaluating  
4 whether a statute implies a private cause of action.” *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995,  
5 1002 (9th Cir. 2013). Having considered the statutory language and structure of the AHTA and FAA,  
6 and being mindful of the Supreme Court’s more recent approach to finding implied rights of action,  
7 the Court finds that the AHTA, as part of the FAA, is governed by the administrative enforcement  
8 scheme and that there is no congressional intent to create an implied right of action.

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10 As there is no congressional intent to create a private right of action, the Court need not assess  
11 the third and fourth *Cort* factors. *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d at 408. In  
12 sum, the Court finds that there is no private right of action under the AHTA and Plaintiff may not  
13 maintain its claim.

#### 14 **B. Whether Plaintiff Must Exhaust Administrative Remedies**

15 Defendant submits that if there is no private right of action, Plaintiff must exhaust  
16 administrative remedies before any lawsuit seeking judicial review may be filed. (Mot. 8–9.) In  
17 opposition, Plaintiff insists that no statutory provision mandates exhaustion. (Resp. Br. 6.)

18 Here, the Court has already determined that there is no private right of action under the AHTA,  
19 in part, because of the extensive administrative enforcement scheme under the Federal Aviation Act.  
20 As set forth above, any “person may file a complaint in writing with the Secretary of Transportation .  
21 . . about a person violating this part.” 49 U.S.C. § 46101(a). This “part” refers to Part A of Title 49,  
22 and the AHTA is listed within subpart IV of Part A, indicating that the enforcement scheme is  
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1 applicable to the AHTA. Without a private right of action, the only method through which a plaintiff  
2 could eventually seek judicial review is to first lodge a complaint with the Secretary and proceed with  
3 the administrative enforcement process. Accordingly, the Court finds that Plaintiff is required to  
4 exhaust its administrative remedies and the AHTA claim must be dismissed.

### 5 **C. Supplemental Jurisdiction Over the Breach of Contract Claim**

6 Defendant seeks to dismiss the breach of contract claim on the ground that, without the AHTA  
7 claim, the Court lacks supplemental jurisdiction over it. (Motion 9–10.) Plaintiff seeks leave to amend  
8 the claim, arguing that the alleged breaches raise substantial federal questions. (Resp. Br. 8.)

9 Because the Court has concluded that there is no private right of action under the AHTA and  
10 the federal question claim must be dismissed, the Court will also dismiss the breach of contract claim  
11 for lack of jurisdiction. However, this case is in the early stages of litigation and no answer to the First  
12 Amended Complaint has been filed. Accordingly, Plaintiff’s request for leave to amend the breach of  
13 contract claim is granted.  
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#### IV. CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss (ECF Nos. 10, 11) is GRANTED.

Plaintiff's request for leave to amend the breach of contract claim is GRANTED.

IT IS SO ORDERED.



/s/ Frances M. Tydingco-Gatewood  
Designated Judge  
Dated: Jun 19, 2018